IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 185 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNION OF INDIA

Versus

HARJIBHAI K.

Appearance:

1. Special Civil Application No. 185 of 1993

MR JC SHETH for Petitioner No. 1-3

MR YV SHAH for Respondent No. 1-15

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 13/08/2003

ORAL JUDGEMENT

Heard learned advocate Mr. JC Sheth for the petitioner and Mr. YV Shah, learned advocate for the

respondent workmen. In this petition, the petitioner has challenged the order passed by the Labour Court, Godhra in Recovery Application under section 33C(2) of the Industrial Disputes Act, 1947 on 23.11.1992 wherein the labour court has granted the recovery application in favour of the respondents workmen by quantifying the amount for their preexisting rights against the Western Railways. This petition was admitted by this court by issuing rule thereon by order dated 18.1.1993. While admitting this petition, this court has stayed the order passed in the recovery application no.5 of 1990 on condition that in case the petitioner loses in the petition and it is required to make payment of the amount as ordered by the labour court or any other amount as may be directed by this court, same shall be paid by the petitioner to the workmen with 12 per cent interest from the date of the said order. Thereafter, subsequently, contention was raised before this court that the Central Administrative Tribunal is having jurisdiction in such matters and not the High Court but after raising of such a contention, ultimately, learned advocate MR. Sheth has agreed before this court that this court is having jurisdiction to entertain the petition challenging the order or award made by the labour court being the central labour court. That contention was examined by this court on 13.12.1995.

During the course of hearing, it was submitted by the learned advocate Mr. Sheth that the labour court has committed gross error in granting recovery application in favour of the workmen and against the petitioner railways. He also submitted that none of the respondents herein had actually worked for over time before the petitioner and no over time work has ever been taken by the petitioner from the respondents and yet, the labour court has, without first deciding such preexisting right of the respondent granted benefit of over time in favour of the workmen. He also submitted that the labour court is having only execution jurisdiction and has no power and jurisdiction to examine fresh right in favour of the respondent workmen. He also submitted that when the written statement was filed by the petitioner before the labour court, said contention alongwith such other contentions were raised in the written arguments but no such contentions were considered by the labour court while passing the impugned order and, therefore, the orders made by the labour court are required to be quashed and set aside. Except these contentions, no other contentions have been raised by the learned advocate Mr. J.C. Sheth before this court.

On the other hand, learned advocate Mr. YV Shah appearing for the respondents workmen has submitted that after filing of the recovery application before the labour court, written statement to such recovery application was filed by the petitioner; thereafter, affidavits were filed by each workmen in support of their case but the petitioner has not challenged the contentions raised by the workmen in their affidavit by producing any evidence before the labour court and by cross examining the workmen before the labour court. No oral and documentary evidence has been produced by the petitioner before the labour court to oppose the claim of the respondent workmen. He also submitted that the advocates were engaged by the petitioner for representing its case before the labour court but ultimately nothing was produced before the labour court though various opportunities were granted by the labour court to the petitioner and, therefore, the labour court was justified in making the ex parte award against the petitioner on the basis of the material on record and, therefore, this court should not interfere with such an award after such a long period. He also submitted that in such circumstances, the labour court was having no option but to believe the contentions raised by the workmen which were supported by the affidavits of the workmen and not controverted by the petitioner by producing any rebuttal evidence. Therefore, he submitted that the labour court has, thus, not committed any error and, therefore, no interference is necessary.

After the submissions of Mr. YV Shah were over, it was again submitted by the learned advocate Mr. Sheth on behalf of the petitioner that since the order in question has been made by the labour court ex parte against the petitioner, the petitioner is prepared to approach the labour court concerned under rule 26A of the Gujarat Rules, 1966 for setting aside such an ex parte orders. Such contention raised by the learned advocate Mr. Sheth has been seriously objected by the learned advocate Mr. Shah by submitting that the claim of recovery of the respondents is relating to the period from 1979 to 1988 and in some cases, it is relating to the period from 1976 to 1988 for which orders were made by the labour court in the year 1992 and the petition after it was admitted by this court is pending before this court since last about more than ten years and, therefore, now this court should not permit the petitioner to approach the labour court concerned under rule 26A of the Gujarat Rules, 1966. He also submitted that some of the workmen have retired and some of them have died during the pendency of proceedings before this

court and now if the petitioner is permitted to approach the labour court concerned under rule 26A of the Gujarat Rules for setting aside of an ex parte award, the respondents will not be able to enjoy the fruits because of their old age and, therefore, such liberty should not be given.

I have considered the submissions made by the learned advocates for the parties. Before the labour court concerned, recovery applications were filed by the workmen under section 33-C-2 of the ID Act, 1947. According to the workmen, they were working with the petitioner Western Railways in its Electric Department and Train Lightening Department Section and according to their Service Rules, 1961, their duty rest has been fixed by the petitioner railways. According to the service rules, if the workman is required to work more than 42 hours without any rest or 48 hours with rest, then, such workman is not entitled for any OT Allowance but according to the respondents workmen, the petitioner railways has taken the work two hours in a day shift and three hours in night shift over time but no over time allowance has been paid by the petitioner railways to the respondents workmen. According to the respondents workmen, before approaching the labour court, they had served the petitioner with legal notice but of no avail and, therefore, they filed the recovery application before the labour court on the basis of the calculation made in para 9 of the recovery application. That table has been given by the labour court in para 2 of the impugned order. According to the workmen before the labour court, they were required to work more than two hours hours from the normal hours in a shift and they were required to work more than three hours from their normal work in night shift and as such, they claimed for over time wages before the labour court. Written statement was filed by the petitioner before the labour court wherein contention about the jurisdiction has been raised by the petitioner that the labour court is not having jurisdiction to decide the recovery application and according to the railway, the workman is required to work more than 50 hours out of 72/66 hours in a week. In short, the claim of the workmen was opposed by the petitioner in its written statement.

Before the labour court, in support of the contentions raised by the workmen in their recovery application, separate affidavits were filed by the workmen. Said affidavits had gone uncontroverted, unchallenged as no oral or documentary evidence contrary thereto has been produced by the petitioner before the

labour court. The petitioner has not taken care to cross examine any of the workmen. Before the labour court, two advocates were engaged by the railways namely Shri JG Chauhan and RC Desai but none of the advocate had represented the case of the petitioner before the labour court and ultimately, one Mr. BV Desai, Senior Divisional Personnel Officer of the Western Railways had filed written arguments before the labour court. Except that, nothing has been produced by the petitioner before the labour court. Thus, the contentions raised by the respondent workmen in their recovery application were supported and substantiated by their affidavit which were admittedly not challenged or controverted by the petitioner by producing any documentary evidence or by examining any of the workmen. Affidavits filed by the workmen were not controverted by the petitioner by examining any of the workman before the labour court concerned. As regards the contention of the petitioner that the recovery application was not filed by the workmen before the labour court in time and it was barred by delay, laches, the labour court has come to the conclusion that there is no limitation prescribed under section 33-C-2 of the ID Act, 1947 for filing recovery application. The labour court has considered one decision of the Central Administrative Tribunal. The labour court has ultimately come to the conclusion that the labour court is competent enough to decide the application and is also having jurisdiction to decide such an application. In para 7 of the award, the labour court has considered looking to the arguments made in the matter, it is the submission of the applicants workmen that the over time work is being taken by the opponents railways from them for which compensation for such over time is not being paid and against that, it was the submission of the present petitioner before the labour court that the applicants are bound to do the work entrusted to them and for completing such work, they cannot claim any compensation in the form of over time allowance. The labour court considered that the affidavits made by the workmen in support of the application has not been challenged by the railways in any manner nor the workman concerned has been cross examined by the petitioner and, therefore, the opponent railway has failed to disprove the facts stated by the workmen in their affidavits. The labour court has, therefore, believed the facts of the application supported by the affidavits of the workmen. According to my opinion, by filing affidavits in support of the contentions raised in the application, the workmen have discharged the burden to disprove the averments made in the application and, therefore, such burden was on the

opponent railway to prove by producing cogent and convincing documentary and oral evidence that such affidavits filed by the workmen are false. In the instant case, the petitioner has not taken any care in discharging such burden and, therefore, according to my opinion, the labour court was right in believing the averments made by the workmen in their application which were supported by their affidavit and not disproved by the opponent. The labour court has, therefore, allowed the application by directing the petitioner to pay to the workmen amount of over time wages.

Considering this record and the reasoning given by the labour court, in such circumstances, when the petitioner is remaining silent and inactive inspite of having two advocates engaged by it, when it has failed to prove by producing necessary oral and documentary evidence to controvert the affidavits filed by the workmen and when it has also failed to cross examine the workmen, I am of the opinion that the labour court was right in believing the case of the workmen supported by their affidavits. Mere pleadings cannot take place of evidence. Pleadings are required to be proved by production of necessary evidence, it may be oral and/or documentary. In the instant case, pleadings of the petitioner filed before the labour court have not been supported by any oral evidence whereas the pleadings of the workmen has been supported by their affidavits and, therefore, in absence of any evidence from the side of the petitioner, the labour court was having no option but to believe the averments of the workmen and was right in believing the same. According to my opinion, in doing so, the labour court has committed no error requiring interference of this court in exercise of the powers under Article 227 of the Constitution of India. Therefore, the labour court has rightly passed the order in question in favour of the respondents workmen. Learned advocate Mr. Sheth appearing for the petitioner has not been able to point out that the labour court has committed any procedural irregularity and/or jurisdictional error. He is also not able to point out that the findings given by the labour court are contrary to the evidence on record produced by the petitioner and, therefore, according to my opinion, the findings recorded by the labour court cannot be considered as perverse an, therefore, it would not require any interference in exercise of the powers under Article 227 of the Constitution of India.

As regards the contention raised by the learned advocate Mr. Sheth that the petitioner will now approach

the labour court by filing appropriate application under Rule 26A of the Industrial Disputes Act (Gujarat) Rules, 1966, it was submitted by the learned advocate Mr. YV Shah on behalf of the workmen that such an application under rule 26A of the said Rules is required to be filed before the labour court within 30 days from the date of receipt of copy of the order of the labour court and the petitioner herein has, after receiving the copy of the order of the labour court, approached this court by way of this petition and the petition, after having been admitted by this court, remained pending for about ten years and during the interim period, some of the wormken have retired from service and some of the workmen have died and now if the petitioner will be permitted to approach the labour court under Rule 26A of the said Gujarat Rules, then, there would be nobody to enjoy the fruits of the order made by the labour court way back in the year 1993 for the period from 1976 to 1988 and, therefore, no such liberty should now be given to the petitioner after this much period. I have considered the submissions made by the learned advocate Mr. Shah for the respondents. According to my opinion, there is 30 days limitation prescribed under rule 26A of the Gujarat Rules, 1966 for approaching the labour court for setting aside an ex parte orders made by the labour court. Immediately after receiving the order from the labour court, it was open for the petitioner to approach the labour court under rule 26A of the said rules but the petitioner has not applied its mind on that availability of an alternative remedy and has straight away approached this Court. The petition was then admitted by this court and interim relief against operation of the order of the labour court was also granted by this court. Thereafter, the matter remained pending before this Court for a period of more than ten years. There has been delay in deciding such a small matter. Neither the petitioner nor the respondents workmen are responsible for such delay but after this much period, now, when this court has already applied its mind on the merits of the matter, it would not be proper on the part of this court to grant such liberty in favour of the petitioner to now approach the labour court under rule 26A of the Gujarat Rules, 1966. In the facts of the present case also, it is not proper to grant such liberty in favour of the petitioner because the period for which the workmen are seeking over time is ranging from 1976 to 1988 for which the order was made by the labour court on 23.11.1992 and the petition filed against the said order has remained pending before this court for this much period during which some of the workmen have retired, some have expired and if the petitioner is now permitted, another round of litigation

would start and in view of these facts of the present case, this court is of the view that such liberty now cannot be given to the petitioner to approach the labour court under rule 26A of the said Rules as this court has already examined the merits of the matter. It is also necessary to consider one more aspect that after issuing rule in this matter, there is no question of considering availability of an alternative remedy and there is no question of relegating the petitioner to such an alternative remedy. After the matter is admitted and the rule is issued in the matter, it is the discretion of this Court to consider as to whether the petitioner should be relegated to the alternative remedy or not. In the facts and circumstances of the present case, this court is of the view that now the petitioner cannot be given such liberty. Therefore, such prayer made by Mr. Sheth on behalf of the petitioner is required to be rejected and the same is rejected accordingly as there must be an end of litigation within some reasonable time.

In view of the above discussion, there is no substance in this petition and the same is required to be dismissed. Same is, therefore, dismissed with costs. Rule is discharged. Interim relief granted earlier shall stand vacated forth with. However, considering the peculiar facts and circumstances of the present case, and also considering the interim order made by this court on 18th January, 1993, according to the condition imposed by this court while granting interim relief in favour of the petitioner, it is necessary for the petitioner to pay the amount as ordered by the labour court to the workmen with interest thereon at the rate of 12 per cent per annum.

Therefore, in the facts and circumstances of the case, petitioner is directed to pay the recovery amount as ordered by the labour court by order dated 23rd November, 1992 in Recovery Application No.5 of 1990 with interest thereon at the rate of 12 per cent per annum to each of the respondents workmen within the period of three months from the date of receipt of copy of this order.

Dt.13.8.2003. (H.K. Rathod,J.)
Vyas